

ADMINISTRATIVE APPEAL OF DEAN HANSEN

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 76-26-A

Decided November 16, 1976

Appeal from a decision of the Commissioner, Bureau of Indian Affairs, affirming Area Director's action demanding trespass damages.

Dismissed.

1. Indian Lands: Trespass: Damages

Notice and demand for collection of damages for trespass on Indian lands are prerequisites to filing suit in federal district court to collect damages for trespass and is not subject to appeal under 25 CFR Part 2.

2. Rules of Practice: Appeals: Standing to Appeal

One having no right or privilege to the use or possession of Indian lands by way of a lease, permit or license has no standing to appeal under 25 CFR Part 2.

APPEARANCES: Wally Eklund, of Johnson, Johnson and Eklund for appellant, Dean Hansen, and Wallace G. Dunker, Field Solicitor, for appellee, Area Director, Aberdeen Area Office.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Under date of May 28, 1976, the above-entitled matter was referred to the Hearings Division, Office of Hearings and Appeals, with directions that a fact-finding hearing be held before an Administrative Law Judge and for the issuance of a recommended decision.

Pursuant to said directive of May 28, 1976, a hearing was scheduled by Administrative Law Judge Michael L. Morehouse for August 3, 1976, in Pierre, South Dakota. However, on July 22, 1976, the Field Solicitor, Aberdeen, South Dakota, Legal Counsel for the Area Director, Aberdeen Area Office, filed a motion with Judge Morehouse to dismiss the appeal for the following reasons:

1. The administrative action of the Superintendent, Crow Creek Agency, in his letter dated April 3, 1975, to the Appellant, Dean Hansen, constituted a notice of livestock trespass upon Indian trust land, pursuant to 25 CFR Section 151.24.
2. In mandatory terms, Section 151.24, requires that "the Superintendent shall take action to collect all such penalties and damages and seek injunctive relief when appropriate."
3. Such letter was mailed certified, return receipt requested, and in addition to such notice, made official demand for the payment of penalty and damages as set forth in Section 151.24 in the total amount of \$5,960.00 by Dean Hansen on grounds that his livestock were in trespass upon Indian trust lands.
4. Such notice and demand were prerequisite to legal action which has now been commenced pursuant to the request of such Superintendent and Area Director and referral to the United States Attorney by the undersigned.
5. The appeal procedures set forth in 25 CFR Part 2, provide for the "correction of actions or decisions of the Bureau of Indian Affairs where the action or decision is protested as a violation of a right or privilege of the Appellant".
6. Such notice and demand of the Superintendent related to an alleged wrong or violation of Dean Hansen of property rights of the Indian owners in the use and possession of Indian trust land and were unrelated to any right or privilege of the Appellant, Dean Hansen, as he held no right to the use or possession of such land by lease, permit, license, or otherwise.
7. By inadvertence, the Superintendent and Area Director acknowledged rights of appeal pursuant to 25 CFR Part 2, to be vested in the Appellant and they followed administrative procedures accordingly; however, the Appellant did not have any right of appeal regarding such notice and demand pursuant to a proper interpretation of such regulations.
8. The Appellant was instead submitting a "complaint" regarding the Superintendent's "notice" and "demand" by his affidavit and the letters and so called

appeals of his attorney. A proper interpretation of 25 CFR Part 2, reveals that the appeal procedures therein set forth are not applicable to "complaints".

The Judge on September 17, 1976, issued an order wherein he recommended dismissal of the appeal. The parties were granted 30 days from the receipt of said order in which to file briefs or exceptions thereto.

The Aberdeen Field Solicitor, for and in behalf of the Aberdeen Area Director, on September 29, 1976, filed with the Board reasons in support of the Judge's recommendation for dismissal of the appeal. The reasons are substantially the same as set forth in his motion to dismiss and are not repeated herein. No brief or exceptions to the recommended order were submitted by the Appellant.

We are in agreement with the Judge's recommendation to dismiss dated September 17, 1976. Accordingly, the Judge's recommendation to dismiss is hereby adopted. A copy of the Judge's recommended order of September 17, 1976, is attached and made a part hereof.

There appears to be no need to repeat and expound on each reason set forth in support of the order recommending dismissal with the exception of the two items set forth below which we feel

to be of great importance in support of the dismissal and worthy of reemphasis.

[1] That a notice and demand for a collection of damages for trespass on Indian lands are prerequisites to filing suit in federal district court to collect damages for trespass and is not subject to appeal pursuant to 25 CFR Part 2.

[2] That one having no right or privilege to the use or possession of Indian lands by way of a lease, permit, or license has no standing to appeal under 25 CFR Part 2.

For the reasons set forth in the Judge's order recommending dismissal and as reemphasized above, the appeal herein should be dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 (2), the Administrative Appeal of Dean Hansen be, and the same is hereby DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

Alexander H. Wilson
Administrative Judge

We concur:

Wm. Philip Horton
Board Member

Mitchell J. Sabagh
Administrative Judge

Attachment

United States Department of the Interior
Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138

September 17, 1976

DEAN HANSEN,	:	IBIA 76-26-A
Appellant	:	
	:	Appeal from a decision of the
v.	:	Area Director, Aberdeen Area Office
BUREAU OF INDIAN AFFAIRS,	:	Bureau of Indian Affairs, dated
Appellee	:	July 10, 1975

ORDER RECOMMENDING DISMISSAL OF APPEAL

By letter dated April 3, 1975, the Superintendent of the Crow Creek Agency notified appellant of a livestock trespass upon Indian trust land and assessed him \$5,960.00 pursuant to 25 CFR 151.24. Appellant answered on April 29, 1975, through his attorney, requesting a hearing or in the alternative an appeal from this notice of assessment. Pursuant to the request, a meeting was held on May 12, 1975, however, no settlement was accomplished at this meeting. On June 3, 1975, the Superintendent reasserted, by certified letter, the assessment of \$5,960.00, which was appealed by letter dated June 11, 1975. On July 10, 1975, the decision of the Superintendent was affirmed by the Area Director, Bureau of Indian Affairs, and on July 15, 1975, appellant filed a notice of appeal to the Commissioner of Indian Affairs. Pursuant to 25 CFR 2.19(b), the matter was automatically referred to the Board of Indian Appeals since the Commissioner took no action on the appeal within the 30-day time limit. On May 28, 1976, the matter was referred to the Hearings Division, Office of Hearings and Appeals with an order directing that a hearing be held before an Administrative Law Judge and, following the hearing, a recommended decision with findings of fact be submitted to the Board.

Pursuant to said order, hearing was scheduled for August 3, 1976, in Pierre, South Dakota, however, on July 22, 1976, the Office of the Solicitor, Department of the Interior, moved to dismiss the appeal and the hearing was continued indefinitely pending resolution of this motion. The basis of said motion is:

1. The Superintendent's letter of April 3, 1975, was, in effect, a prerequisite to filing suit in Federal District Court to collect damages for trespass.
2. Appellant's appeal from this notice and demand was, in effect, a "complaint" and the rules governing rights of appeal in 25 CFR 2.1 et seq. are not applicable to "complaints".
3. The Superintendent and Area Director acknowledged appellant's right of appeal pursuant to 25 CFR, Part 2, by inadvertence when, in fact, no such right existed.
4. The appeal should be dismissed for lack of jurisdiction based on the above, such dismissal in no way to jeopardize the rights of appellant in the defense of any action commenced by the United States for the recovery of trespass damages.

The motion is unopposed. In addition, advice has been received that the United States has filed suit against appellant, Civil No. 76-3038, in Federal District Court for the District of South Dakota, Central Division, for trespass damages.

For the above reasons, it is recommended that an order be entered dismissing the appeal.

Michael L. Morehouse
Administrative Law Judge